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In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

CALLERY PROPERTIES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered on August 14, 1964.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (U.G.I. Pet. 9a-37a [1]) is reported at 335

[1] "U.G.I. Pet." refers to the petition for a writ of certiorari filed by The United Gas Improvement Company and others in this case. No. 671. Another petition raising the same issues has been filed by the Public Service Commission of New York. No. 678.

F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 and 398A, are published at 30 FPC 283 and 682.

JURISDICTION

The judgments of the court of appeals reversing the Commission's order and remanding the proceedings were entered on August 14, 1964 (U.G.I. Pet. 38a-40a [2]). By order of Mr. Justice Black, the time within which the Commission might petition for a writ of certiorari was extended to December 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. In determining the initial price at which it will certificate a producer's sale of natural gas under Section 7 of the Natural Gas Act, must the Commission receive and consider the kind of evidence (voluminous economic and financial evidence, including individual-company, areawide, and nationwide studies and data concerning cost of service, cash flow, supply and demand, profit and market price trends, cost-revenue trends, comparative well costs, etc.) some of which would be appropriate in a full-blown rate proceeding?

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[2] Petitions for rehearing filed by J. Ray McDermott Co. (C.A.5 No. 20967), J. R. Frankel, *et al.* (C.A.5 No. 21028), and The Superior Oil Company (C.A.5 No. 20885) were denied on September 22, 1964.

2. May the Commission condition the grant of a permanent certificate to sell gas in interstate commerce upon the applicant's willingness to refrain from filing any rate increase above a specified level during the pendency of area rate proceedings?

3. May the Commission, in granting a permanent certificate to sell gas in interstate commerce at an initial price determined to be in the public interest, require that the applicant refund all charges in excess of that price which were previously collected under an earlier unconditional certificate which had been held illegal on court review?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4 and 7(c) and (e), 52 Stat. 821, as amended, 15 U.S.C. 717-717w) are set out in the appendix, *infra*, pp. 16-20.

STATEMENT

In a series of orders issued in 1959, the Commission granted unconditioned certificates of public convenience and necessity authorizing sales by 42 producers of gas in South Louisiana. The contracts, executed in 1957 and 1958, called for initial prices ranging from 21.4 cents to 23.8 cents per Mcf.[3] The

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[3] *Texas Gas Transmission Corp. (Hope Natural Gas Co.)*, Opinion No. 327, 22 FPC 378, 386-389, rehearing denied, 22 FPC 657; *The California Co. (United Gas Pipe Line Co.)*, 22 FPC 252, rehearing denied, 22 FPC 653; *The Superior Oil Co. (Transco)*, 22 FPC 369, rehearing denied, 22 FPC 655;

producers accepted the certificates and, within a short time, commenced deliveries.

Consumer representatives, who had opposed the certificate applications before the Commission on the ground that the proposed contract prices were excessive, sought judicial review of the orders in five courts of appeals. The Third Circuit sustained the Commission's action,[4] but this Court summarily reversed [5] and ordered the case remanded to the Commission for reconsideration in the light of *Atlantic Refining Co.* v. *Public Service Commission of New York* (CATCO), 360 U.S. 378. The other four courts of appeals thereupon reversed similar Commission orders and remanded the proceedings to the Commission.[6]

Sun Oil Co. (United Gas Pipe Line Co.), 22 FPC 351, rehearing denied, 22 FPC 654; and *Sunray Mid-Continent Oil Co. (Transco)*, 22 FPC 361, rehearing denied, 22 FPC 652.

[4] *United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. 2d 865.

[5] *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195.

[6] *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A.9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.* and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York and Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 880 and 882; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A.10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A.5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S.

The Commission subsequently instituted an area rate proceeding for South Louisiana and consolidated the remanded cases with that proceeding (R. 376). While denying motions of the consumer intervenors which would have required the producers to post security, the Commission issued an order advising the producers of their potential obligation to refund any amounts collected in excess of those ultimately found to be proper under Section 7 of the Natural Gas Act (R. 395).[7] When it became apparent that decision in the area rate proceeding would necessarily be delayed, the Commission severed this group of applications and set them for hearing in a consolidated proceeding under Section 7 (R. 410).[8] The examiner ruled that the proper standard for determining the initial prices which would serve the public convenience and necessity was the general level of prices un-

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823; and *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A.5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

[7] The Courts of Appeals for the Third and Fifth Circuits dismissed as premature petitions to review that advisory order (*Shell Oil Co.* v. *Federal Power Commission*, C.A. 3 No. 14031 (Oct. 2, 1962); *Callery Properties, Inc., et al.* v. *Federal Power Commission*, C.A. 5 Nos. 19563, 19622, 19653, 19663 (Sept. 20, 1963)).

[8] By the time the hearings commenced, many of the cases had been settled, and only 21 of the original 74 dockets remained outstanding. In the course of the hearings, eight additional dockets were settled, leaving only 13, involving nine producers, for decision. One producer accepted the Commission's order and withdrew its petition for review in the court below. *Kilroy Properties, Inc.* v. *Federal Power Commission*, C.A. 5 No. 21029 (Mar. 31, 1963).

der contracts roughly contemporaneous with petitioners' and free of the infirmities which had led the courts to disapprove the original grants of unconditioned certificates. Adopting this standard, he excluded as irrelevant to this issue voluminous cost evidence and other economic data tendered by petitioners which, in his view, would have converted the proceeding into "some 16 different individual producer cost-type cases" (R. 491, 496).

The Examiner concluded that the "in-line" price for sales in South Louisiana under 1957 and 1958 contracts was 18.5 cents per Mcf (plus 1.5 cents reimbursement for the Louisiana gas severance tax where applicable) and ordered refunds of all amounts previously collected in excess of that price (R. 499-509, 515-527).*

The Commission affirmed the examiner (R. 549). Moreover, in order to forestall the filing of rate increases which might trigger "favored nations" clauses in a great many other contracts, the Commission ordered a moratorium on all price increases in excess of 23.55 cents per Mcf (including tax reimbursement) until July 1, 1967, or the final decision in the area rate proceeding, whichever is earlier (R. 574-579).

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* He also decided that the take-or-pay provisions of the sales contracts should be left as they were until completion of a pending rule-making proceeding on the subject (Docket No. R-199, 26 Fed. Reg. 4615, May 26, 1961), at which time petitioners' contracts should be modified to conform to the decision therein, subject to a floor of 80% of the annual minimum quantities called for by the contracts. The court below held this condition not presently reviewable (U.G.I. Pet. 36a-37a) and it is not here in issue.

The court below held that the Commission erred in refusing to consider the economic evidence proffered by the producers. It further held that, in conditioning the issuance of a certificate, the Commission could impose no restriction upon a producer's filing of rate increases. Finally, although it sustained the Commission's authority to order refunds of excessive charges collected under the unconditioned certificate, the court ruled that such refunds are to be measured not by the conditioned initial price ultimately established in the certificate proceeding itself but by a "just and reasonable" rate later to be determined in proceedings under Section 4 or 5 of the Act.

REASONS FOR GRANTING THE WRIT

This case presents two important issues as to the scope and proper exercise of the Commission's power to impose price conditions upon the grant of permanent certificate authority to sell gas in interstate commerce.

The first issue is whether the Commission may rely solely upon an "in-line" determination in fixing the initial price at which it will authorize a sale, or is obliged to receive and consider a voluminous body of cost and other economic evidence offered by the applicant in support of an out-of-line price. The decision below, requiring the Commission to consider such evidence, is squarely in conflict with the recent decision of the Court of Appeals for the District of Columbia Circuit in *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242, certiorari

denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 973.

The second issue is closely related to the question decided last Term in *Federal Power Commission* v. *Hunt*, 376 U.S. 515. There, the Court upheld the Commission's power, in granting a *temporary* certificate, to bar any increase in the initial price pending a hearing on the applicant's petition for permanent authority. The Court noted (at 526) that "the extent of that power in permanent certification is not before us now." The substantial issue not reached in *Hunt* is presented here: whether a permanent certificate may be conditioned upon the applicant's willingness to refrain, for a reasonable time, from filing price increases to a level which, in the Commission's view, would lead to widespread triggering of price-escalation clauses in other gas purchase contracts.

The third question presented, while perhaps not sufficiently important by itself to warrant certiorari, is a recurrent problem that this Court should resolve with the major questions.

1. *The Determination of Initial Price.* While verbally acknowledging the futility of "turning every [Section] 7 application into a full blown rate hearing" (U.G.I. Pet. 18a, 25a), the court below nonetheless held that the Commission was required to receive and consider a mass of data comprising not only the typical cost-of-service presentation which would have sufficed for a "full blown rate hearing," but also detailed economic evidence pertaining to the individual company, to the area, and to the nation as a whole (U.G.I. Pet. 16a-26a). The offer of proof alone, without cross-

examination or rebuttal evidence, covers some 2000 pages of record. Plainly, the Fifth Circuit's ruling would entail a drastic enlargement in the scope of certificate proceedings. In our view, it would increase administrative burdens to the point that the Commission's efforts to bring the producers of natural gas under effective regulation might be significantly impaired. See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294; *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 527.

This holding, as already noted, is in direct conflict with the decision of the District of Columbia Circuit in *Public Service Commission of New York* v. *Federal Power Commission (Skelly)*,[10] *supra*. In that case, the court of appeals sustained the Commission's action in conditioning certificates of public convenience and necessity upon the acceptance of an "in-line" initial price, and in refusing to consider cost and other economic data relating to factors other than prices for comparable sales. The court explicity held (329 F. 2d at 245) that, under *CATCO*, the Commission's duty in Section 7 proceedings is "to condition certificates by requiring an 'in-line' initial price" and concluded (at 246) that such proceedings—

> * * * permit the Commission to fix the "in-line" price, not on a basis of cash outlay or replacement costs, but on the basis of the price level

[10] This decision is referred to herein as *"Skelly"* to distinguish it from a number of other cases in the courts of appeals bearing the same caption; it sustained the Commission's order in *Skelly Oil Co., et al.*, Opinion Nos. 362 and 362-A, 28 F.P.C. 401 and 1065.

established by comparable sales contracted for by those placing gas in the area in interstate commerce. * * *

It is true, as the court below noted, that the evidence "proffered and rejected in [*Skelly*] was much more limited than that here" (U.G.I. Pet. 18a, fn. 32). The District of Columbia Circuit, however, was not concerned with the weight or sufficiency of the evidence, but with whether such evidence need be considered at all in a Section 7 proceeding.[11] Its conclusion—that such an inquiry would defeat "the purpose of *CATCO* to avoid the consequences of the well nigh interminable proceedings incident to a rate case" (329 F. 2d at 246-247)—applies with even greater force to the similar but more voluminous evidence offered here.[12]

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[11] The initial price established by the Commission in a Section 7 certificate case merely sets the rate which the producer may charge free of refund obligation pending a just and reasonable rate determination pursuant to Section 4(e) or 5(a) of the Act. Within contract limitations and subject to any moratorium on the filing of "triggering" rates (see, *infra*, pp. 11-13), the producers are free to file for rate increases and to collect the increased rates subject to refund at the expiration of the suspension period.

[12] The Commission's rejection of financial and cost evidence purporting to show that the certificated price should exceed the "in-line" price is also in accord with earlier court of appeals decisions. *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149, 153 (C.A.5); *California Oil Co.* v. *Federal Power Commission*, 315 F. 2d 652 (C.A.10); see also, *Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677, 680 (C.A.D.C.).

In short, the issue is important and the conflict unmistakable.

2. *The Price Moratorium.* The court below also held the Commission powerless to impose a limited moratorium upon price increases as a condition of granting a permanent certificate. Without questioning the Commission's findings that 23.5 cents was the potential triggering level, and that to allow respondents any higher price could result in a general breakthrough of the current price ceiling in the area, the court ruled that Section 4 of the Act gives a natural gas company an absolute right to file price increases authorized by private contract—a right which under no circumstances can be impaired by an exercise of the Commission's authority to fix the terms and conditions of certificates. This, we submit, misconceives the relationship between Sections 4 and 7.

In *CATCO,* this Court stated (360 U.S. at 391): "Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." We believe, therefore, that the Commission has ample discretion, in applying the standard of public convenience and necessity, to deny a certificate altogether on the ground that escalations authorized by the contract would set off a chain reaction of price increases throughout the area, inconsistent with the protection the Act was intended to afford consumers until reasonable rates can be determined. *A fortiori,* the Commission has the lesser power to grant a certificate

upon condition that the dangerous potentialities of the sale be eliminated.

Section 4 of the Act is no impediment to this conclusion. Section "4(d) is simply a prohibition [against a producer's changing rates without an appropriate filing], not a grant of power." *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339. It carries no implication that the Commission, in the exercise of its Section 7 power to prescribe conditions for the entry of natural gas into interstate commerce, is precluded from placing limitations upon new rate filings where it finds such limitations required by the public convenience and necessity. Indeed, in *Federal Power Commission* v. *Hunt*, 376 U.S. 515, this Court made it clear that "the Commission was given the power [by Section 7 of the Natural Gas Act] to lay down conditions precedent to the entry of the natural gas into interstate commerce" and "[Section] 4 does not come into play until after the initial certification of the natural gas into interstate commerce has been granted under [Section] 7" (at 526, 522). That reasoning, we submit, is applicable to the present case. Moreover, in *Federal Power Commission* v. *Texaco Inc.*, 377 U.S. 33, decided less than a month after *Hunt*, this Court upheld the validity of Commission rules barring the issuance of a certificate for any sale based upon a contract containing an "indefinite" price escalation clause. The decision below, in subordinating Section 7 to Section 4 and denying the Commission's power to condition a producer's entry into the interstate market upon a

limited waiver of his contractual right to file price increases, is inconsistant in principle and reasoning with *Hunt* and *Texaco*.

We submit that the Commission was well within its discretion in concluding that authorization of these sales would be required by the public convenience and necessity only if the producers were willing to abstain from filing price increases above the triggering level until the just and reasonable prices for the sales could be determined in the pending area rate case, or, at the latest, July 1, 1967. Such a moratorium is vital if the price line is to be kept under control pending the completion of the area proceedings.

3. *The Refund Issue.* When the original unconditioned certificates were found defective, the sales were allowed to continue pending the new hearing to fix the proper initial price. Subsequently, in the order under review, the Commission required that respondents refund to their customers any difference between the rates they were charging and the rate found to be the appropriate certificate price. The court below acknowledged the Commission's right to order refunds.[13] It concluded, however, that the proper measure was the amount by which the rates collected under the invalid certificates exceeded the price ultimately determined to be just and reasonable in an appropriate rate proceeding. The court reasoned that the producer should be entitled

[13] One of the producers, Ocean Drilling & Exploration Company, has filed a petition for certiorari to review this ruling. No. 714.

to retain, and consumers required to pay, no less than a just and reasonable price, and that if that price should turn out to be higher than the "in-line" price established in the certificate proceeding, producers who had already made refunds down to the lower "in-line" price would be unable to recapture the excessive reimbursements. That holding, we believe, was erroneous. In our view, a producer who commences service under a permanent certificate later held invalid, or under a temporary certificate issued *ex parte*, should be permitted to collect and retain no higher price than that which he would have received under a properly conditioned permanent certificate. In short, he is entitled to no more than an "in-line" price until such time as a just and reasonable rate is determined.

Since the ruling below is in terms confined to the rather unusual situation in which refunds are ordered because of the invalidation of the original certificate, the issue is not in itself of sufficient importance to warrant the intervention of this Court. However, the court's reasoning casts doubt on the standard of measurement to be applied in the more common case where the producer's obligation stems from its commencement of operations pursuant to temporary authority at a price higher than that subsequently found to be the proper initial price. *Skelly*, *supra* (329 F. 2d at 249-250); cf. *Hunt Oil Co.* v. *Federal Power Commission*, 334 F. 2d 474, 479 (C.A. 5) (involving temporary authorizations issued to replace permanent certificates after judicial remands). In the latter con-

text, the scope of the refund obligation is a recurrent problem.[14]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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December, 1964

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[14] The court of appeals also noticed (U.G.I. Pet. 36a) that respondents challenged the Commission's determination of the "in-line" prices, but it did not reach the point. If certiorari is granted, we shall set forth our reasons for believing that the Commission's method was proper and that no remand on this point is necessary.

APPENDIX

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are as follows:

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping upon for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with

reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,*

That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

Sec. 7(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the opera-

tion, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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